No. 98-1037

In The

Supreme Court of the United States

GEORGE SMITH, WARDEN,

Petitioner,

v.

LEE ROBBINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR AMICUS NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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BRIEF OF AMICUS NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

This brief amicus curiae is submitted in support of Respondent Lee Robbins. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.[1]

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

In NACDL's view, there are three separate but overlapping issues presented in this case: (1) what actions of an assigned appellate counsel best serve the interests of a

[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

convicted defendant; (2) what are the ethical and constitutional obligations of defense counsel when assigned to represent a convicted indigent defendant on appeal; (3) what rule as to the obligations of assigned appellate counsel best serves the institutional interests of the criminal justice system.

NACDL, consistent with its mission, files this brief amicus curiae in support of Respondent's claim that the requirements of *Anders v. California*, 386 U.S. 738 (1967) establish the minimum constitutional standards for appointed appellate counsel. NACDL rejects Petitioner's argument that the California modification of *Anders* in *People v. Wende*, 25 Cal.3d 436, 158 Cal. Rptr. 839 (Cal. 1979) satisfies the basic constitutional requirements established by this Court or the assertion of the Amicus Criminal Justice Legal Foundation that *Anders* creates "an impossible ethical dilemma for appointed counsel." (*Amicus* Brief at 10). NACDL believes that the *Anders* standard best reconciles and serves the interests of defendant, counsel and the system.

STATEMENT

Amicus adopts petitioner's statement of the case.

SUMMARY OF ARGUMENT

The requirements of *Anders* fulfills the constitutional mandate of effective assistance of counsel for indigent defendants convicted of a crime and seeking to appeal

their conviction. *Douglas v. California*, 372 U.S. 353 (1963). Assigned counsel must examine the record, identify possible appeal issues and prepare a written brief for a reviewing court. In this manner, counsel acts as an active advocate for his client, examining and describing all possible bases for appeal, thus aiding the defendant to identify issues for a possible pro se brief and assisting the reviewing court who would otherwise have to examine a cold record without guidance. In the majority of cases, having followed the requirements of *Anders*, counsel will prepare a full merits brief based on the issues he or she identified as a possible basis for appeal. The California procedure at issue here, which purportedly eliminates the need to identify possible appeal issues, does not and cannot satisfy the requirements of *Anders*. It shortcuts the process, assisting neither the defendant who is afforded no guidance on possible appeal points, nor the reviewing court, who must examine a cold record for possible errors.

ARGUMENT

THE REQUIREMENTS OF *ANDERS* WERE NOT MET IN THIS CASE, REQUIRING REVERSAL OF THE CONVICTION

This Court established the basic standards for assigned appellate counsel in *Anders*. The rule in that case was "based on the underlying constitutional right to appointed counsel established in *Douglas v. California*, 372 U.S. 353 (1963)" as this Court noted in *Pennsylvania v. Finley*, 481 U.S. 551, 554 (1987). Since "denial of counsel to

indigents on first appeal as of right amounted to unconstitutional discrimination against the poor," *id.*, this Court required that counsel appointed pursuant to *Douglas* must act as a true advocate for his client, even if "that attorney has conscientiously determined that there is no merit to the indigent's appeal," *Anders*, 386 U.S. at 739.

In *Anders*, counsel had been appointed to represent an indigent defendant on appeal. He examined the record and determined that there were no meritorious issues to raise on appeal and submitted a "no merit" letter to the appeal court, in accordance with the procedure then in effect in California.

> "I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him * * * . (H)e wishes to file a brief in this matter on his own behalf." 386 U.S. at 742.

This Court held that counsel's actions were insufficient to satisfy the requirements of the Sixth Amendment as interpreted by this Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Douglas v. California*, 372 U.S. 353 (1963). "We believe that counsel's bare conclusion, as evidenced by his letter, was not enough." This Court explained:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client. . . . The no-merit letter and the procedure it triggers do not reach that dignity. . . . His role as advocate requires that he support his client's appeal to the best of his ability. *Id.* at 744.

On the other hand, if counsel truly finds no issues to argue on appeal, he must nevertheless point out issues that a reviewing court might consider relevant:

> Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court – not counsel – then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal. *Id.* at 744.

This requirement, the Court found, did not "force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain." By contrast, the California "no-merit" procedure rejected by this Court "affords neither the client nor the court any aid. The former must shift entirely for himself, while the court has only the cold record which it must review without the help of an advocate." *Id.* at 745.

This Court later explained the twin requirements of *Anders*. "The so-called *Anders*-brief serves the valuable purpose of assisting the court in determining both that counsel in fact conducted the required detailed review of the case and that the appeal is indeed so frivolous that it may be decided without an adversary presentation." *Penson v. Ohio*, 488 U.S. 75, 81-82 (1988).

The procedure allegedly established by California in *People v. Wende*, 25 Cal.3d 436, 158 Cal. Rptr. 839 (1979) does not meet the requirements of *Anders*.[2] The California procedure, as described by Petitioner, allegedly required counsel to examine the record and file a brief outlining the facts of the case. However, counsel was not required to identify any arguable issues that he or she found frivolous. Instead the court was obliged to "conduct a review of the entire record whenever appointed counsel submits a brief which raises no specific issues or describes the appeal as frivolous." *Wende*, 25 Cal.3d at 441.

The Ninth Circuit correctly found this procedure to be inadequate.

> It is apparent that those requirements [of *Anders*] were not met. Robbins's appointed counsel neither provided active and vigorous appellate representation nor complied with *Anders*. . . . The brief filed on Robbins's behalf completely failed to identify any grounds that arguably supported an appeal. Rather, it briefly summarized the procedural and historical facts of the case and requested that the state appellate court "independently review the entire record for arguable issues." Accordingly, the district court correctly found that Robbins's counsel did not comply with *Anders*.

152 F.3d at 1067.

The minimum *Anders* requirements of counsel review of the record, identification of arguable issues and presentation of a brief to an appellate court serves the needs of the indigent defendant, the ethical requirements and constitutional responsibilities of counsel and the institutional needs of the criminal justice system in manner that the watered-down *Wende* procedure does not.

As a practical matter, requiring counsel to look for and identify arguable non-frivolous issues often leads to counsel actually arguing those issues in a full merits appeal. Defense counsel, like most lawyers, do not like to engage in useless or unnecessary activity. Having read the record and identified a legal issue or legal issues that could be raised on appeal, the majority of criminal defense counsel will present such issues in a full appeal, rather than bow out and simply note them for possible review by the appeal court.[3] This is the basis for the

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[2] There is a substantial question whether Petitioner's Brief correctly describes the *Wende* procedure. See Petitioner's Brief at 8, 18-19. The idea that *Wende* expanded or "enlarged" the requirements of *Anders* is impossible to credit, as explained in the text. In any event, it appears that the rationale of *Wende*, that appellate review of the record is an adequate substitute for attorney identification of issues, has been subsequently rejected by the California courts. See *In re Sade C.*, 37 Cal. App. 4th 88, 112, n. 18, 44 Cal.Rptr. 2d 509 (1995).

[3] The State of Arizona in its *Amicus* brief cites figures showing that in eleven states cited the average number of

Anders rule: "A proper interpretation of the *Anders* decision, however, reveals a workable and just procedure for dealing with frivolous appeals. If appointed, counsel should conscientiously examine the record to determine whether any issues support reversal. Counsel should not speculate on the likely success of an appeal, but instead must evaluate the record as an advocate, making the most powerful arguments justified by the facts." Note, "The Right to Counsel in 'Frivolous' Appeals: A Reevaluation of the Guarantees of *Anders v. California*," 67 *Tex. L. Rev.* 181, 187 (1988).

Even if counsel determines the issues are frivolous, the identification of a legal issue benefits the defendant who, at the least, knows what legal issues can be raised in a pro se brief. It also assists the appellate court by pointing to issues that it may require to be fully briefed.

Anders appeals was about 20% in 1993-94. But the same law review article cited as the basis for the figures indicates that in most jurisdictions, the percentage of *Anders* briefs is far less. Furthermore there is a great variation within the states. The author comments: "How state courts have addressed the *Anders* issue varies widely. Ten states have rejected the *Anders* procedure. In some states, the public defenders refuse to file such briefs. A survey of the courts of appeal following the *Anders* procedure reveals that the percentage of the criminal caseload comprised of *Anders* appeals varies widely – from less than one percent, to a high of thirty-nine percent, of the total filings. The internal process each court uses in reviewing an *Anders* brief also differs markedly. The survey results show that handling *Anders* appeals continues to be an analytical and managerial problem for state appellate courts." See Warner, "*Anders* in the Fifty States: Some Appellants' Equal Protection is More Equal Than Others," 23 *Fla. State U.L. Rev.* 625, 642-43, 668, fn. 225, 228 (1996) and Appendix.

On the other hand, simply requiring an appellate lawyer to review the record, describe the facts and the law without identifying arguable issues does not put the same pressure on counsel to fully argue the case. He or she cannot be a "active advocate" for his client by merely summarizing the historical and procedural facts, as occurred in this case. This diluted procedure certainly does not assist the defendant to identify issues to be presented in a pro se brief. Nor does it assist an appellate court in determining whether the appeal is truly frivolous or not. With only a general description of the case and without the identification of arguable issues, an appeal court is without the ability to make reasoned decisions about the merits of a full appeal.

Against this argument, petitioner and his supporting amici contend that counsel's identification of issues as frivolous and non-worthy of appeal somehow works against the interest of the defendant. "The Janus-faced *Anders* brief filed by counsel is often either perfunctory or a brief against the client," *i.e.*, by identifying issues and declaring them frivolous, an *Anders* brief poisons the minds of reviewing courts who examine the issues at later stages of the proceedings. See Brief of *Amicus* Criminal Justice Legal Foundation at 11.

It is difficult to see how the alleged *Wende* procedure, which requires only a factual and procedural presentation of the case, is more complete or less "perfunctory" than the *Anders* brief. Furthermore, as noted above, in the great majority of cases, appellate counsel do not file *Anders* briefs. The pressure to identify issues generally leads counsel to file full merits appeals on those issues, thus fulfilling the dictates of *Douglas*.

Anders, as presently interpreted by the Court below, fulfills this Court's original direction and purpose. It assists the system "in determining both that counsel in fact conducted the required detailed review of the case and that the appeal is indeed so frivolous that it may be decided without an adversary presentation." *Penson v. Ohio*, 488 U.S. 75, 81-82 (1988). More important, it requires counsel and not busy appellate courts to do the detailed examination of the record and research into possible appeal points.

The California procedure under examination in this case did not meet the requirements of *Anders* and did not satisfy the Sixth Amendment requirement of assistance of counsel as interpreted by this Court. That failure was prejudicial as a matter of law. See *Allen v. United States*, 938 F.2d 664, 665 (6th Cir. 1991): " . . . appellate counsel's failure to meet the requirements of *Anders* is presumptively prejudicial. . . . " See also *Davis v. Kramer*, 167 F.3d 494 (9th Cir. 1999) (failure to file brief meeting requirements of *Anders* leaves defendant without counsel and is presumptively prejudicial under *Penson*); *Delgado v. Lewis*, 168 F.3d 1148 (9th Cir. 1999) (failure to follow *Anders* requirements constitutes ineffective assistance of counsel). See generally Note, "The Right to Counsel in 'Frivolous Appeals: A Reevaluation of the Guarantees of *Anders v. California*," 67 *Tex. L. Rev.* 181, 184 (1988), arguing for a *per se* rule: "This Note argues that courts should not require an indigent to show prejudice when counsel either withdraws from an appeal without complying with

Anders or fails to prosecute the appeal as an active advocate."

CONCLUSION

For the reasons stated above, the decision below should be affirmed.

Dated: New York, N.Y.
June 21, 1999

Respectfully submitted,

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